IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 475

WILLIAM DOUGLAS and BENNIE WILL MEYES,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF.

STANLEY MOSK,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
JACK E. GOERTZEN,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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RESPONDENT'S BRIEF.

Introduction.

Petitioners, Meyes and Douglas were charged, tried and convicted of thirteen felonies which included robbery, assault with intent to commit murder, and assault with a deadly weapon. [Tr. of R. pp. 1-20.]

The only issues raised by petitioners herein center on matters arising before the actual taking of evidence commenced, or on matters relating to taking of their appeals. (Br. for Pet. pp. 5-21.)

The actual testimony of the prosecution witnesses concerning the felonies charged and of which petitioners were convicted is, for the most part, eyewitness testimony of the victims of said petitioners which includes cogent identifications of the petitioners as perpetrators of said crimes. [Tr. of R. pp. 104-151.]

Statement of the Case.

On August 18, 1959, the office of the Public Defender was appointed in open court by the trial judge to represent petitioners in the felony charges against them. Petitioners were arraigned. [Tr. of R. p. 9.]

On August 21, 1959, petitioners appeared in court with a Deputy Public Defender, and they each entered pleas of "Not Guilty". Petitioner Meyes additionally denied the three prior felony convictions charged against him. The case was set for trial on September 30, 1959. [Tr. of R. pp. 10-11.]

On September 30, 1959, the case was called for trial, and petitioners' counsel, Deputy Public Defender Atkins, was present. [Tr. of R. pp. 11-12.]

The first matter placed before the trial court by petitioners' counsel was a motion pursuant to California Code of Civil Procedure, Section 170.6 to dismiss the trial judge. [Tr. of R. pp. 28-30.]

The motion was denied due to the fact petitioners' counsel had not filed it in a timely manner. [Tr. of R. p. 28.]

The next motion urged on the trial court, was a motion for a continuance on the sole ground that counsel for petitioners had not completed his investigation of all of the prosecution witnesses, presented in the following manner:

> "Mr. Atkins: We are not ready for trial for the reason that in view of the many counts involved—there are 13 counts—the defense is not ready because we have not been able to complete the investigation as to certain defenses which we are trying to develop as to these many dates. In other words, the investigation is not complete as to certain defenses which we are trying to develop.

The Court: It leaves me so vague I cannot get ahold of it.

Mr. Atkins: Let me be more explicit. There are many dates and alibis as to any of these dates would certainly help and aid the defense in the matter. There are so many that it is difficult to check each one and develop the people who might have known these men and who might for one reason or another be able to remember certain dates. For that reason we have not been able to complete the investigation, contact these people, and interrogate them, asking them their possible reasons for remembering certain dates. We have just not been able to complete that investigation, your Honor." [Tr. of R. p. 29.]

The trial court denied the motion for continuance.

"The Court: Yes. I do not believe that your reasons are sufficient, so the matter will be set for trial." [Tr. of R. p. 31.]

Then, for the first time, Mr. Atkins stated to the court that petitioner Douglas wanted his own counsel:

"Mr. Atkins: Your Honor, I would renew my motion for a continuance for the following reasons: First, Mr. Douglas feels that he would like to have an attorney of his own to represent him. He feels that there may be during this trial conflict which will arise in which case he would want an attorney of his own to be arguing and representing him alone apart from Meyes." [Tr. of R. p. 31.]

Mr. Atkins went on to advise the court of Meyes' conviction and Douglas' acquittal of a murder "which is tied up in this case." Mr. Atkins advised that the

problem, "arose only yesterday amongst other problems—". Mr. Atkins reiterated that "the investigation is not complete as to the defense which these defendants would like to present." Mr. Atkins discussed the time lapse between the criminal acts charged and the date the trial was to commence. Then he said:

> ". . . On my own part I feel that I am prepared." [Tr. of R. pp. 31-32.]

Mr. Atkins said that he hadn't studied the transcripts of previous trials. [Tr. of R. p. 32.] Later, he changed this to mean that "he had not had the opportunity to cross-index" the transcripts. [Tr. of R. pp. 75, 156.]

The trial judge had cause to later observe that the prior murder trial transcripts "are very well marked with notations sticking out of the end of the transcripts." [Tr. of R. p. 165.]

The prosecutor, Mr. Carr, pointed out that there had been ample notice to the petitioners of what prosecution witnesses would be used; they merely had to look at the transcript of the earlier murder trials in which evidence of the instant robberies had been received to show motive for the killing of an arresting officer. [Tr. of R. pp. 32-33.]

At this time, Mr. Atkins brought up another reason for continuance:

> ". . . Now, in addition, let me state this: Mr. Douglas states that his mother has a serious illness, that he does not feel mentally ready for trial in that he is worried about his mother and does not feel prepared for the trial. In other words, he does not feel prepared to defend himself now with all of the faculties which he possesses. I offer that as another reason." [Tr. of R. p. 34.]

The judge denied the continuance that had been urged on the grounds of an incomplete investigation and found that defendants had had plenty of time to formulate their alibis. [Tr. of R. p. 34.]

At this time, the trial judge asked for comments of counsel on the matter of conflict of interest. The prosecutor commented that in going over the prior murder trials of petitioners with respect to the evidence received in those trials of the instant felonies (to show motive), that petitioners "made a general and categorical denial as to any participation or knowledge of those robberies." The prosecutor commented that he did not recall "any conflict." [Tr. of R. p. 35.]

Mr. Atkins replied:

> "What has happened since then? Well, something has happened since then, your Honor. Douglas was acquitted and Bennie Meyes was convicted. Now, I can defend both of them, but I am at a disadvantage in that if I defend both of them the stigma of the murder conviction as to Bennie Meyes—I have to talk out of one side of my mouth as to Bennie Meyes and out of the other side of my mouth as to Mr. Douglas.
>
> The Court: I do not know why—
>
> Mr. Atkins: I do not think that it is fair for Mr. Douglas. He should have an attorney who would represent him and him alone who can make the best use of the fact that an acquittal was earned on his behalf in the murder trial. That is a conflict. I submit to your Honor that that is a conflict in presenting the case which should be obvious to anyone that two lawyers are necessary." [Tr. of R. p. 36.]

The motion for appointment of another counsel for Douglas was denied. [Tr. of R. p. 36.]

After a short recess, Mr. Atkins represented to the court *for the very first time*, that Douglas had actually made arrangements with an attorney to defend him and again moved for a continuance. The trial court denied said motion. [Tr. of R. p. 36.]

The prospective jury panel was then sworn, and petitioner Meyes informed the court for the first time that he didn't want Mr. Atkins as his counsel on the sole ground that "he has not read these transcripts", and further that Mr. Atkins had only been up to talk to petitioners "twice". [Tr. of R. p. 37.]

Petitioner Meyes went on to inform the court that Mr. Atkins was representing him against Meyes' wishes and that petitioner Meyes had called in the F.B.I. to investigate the "fake and phony" charges of robbery against him. [Tr. of R. p. 38.]

At this time, petitioner Meyes commenced a running series of interruptions that continued throughout the proceedings. [Tr. of R. p. 39, *et seq.*]

Mr. Atkins approached the bench and advised the court that he was unable to conduct his case due to Meyes' behaviour. The prosecutor advised the court of the possible reason for Meyes' conduct. [Tr. of R. pp. 39-40.]

Once again, Mr. Atkins raised the issue of a possible conflict. [Tr. of R. p. 42.] Mr. Atkins conferred with petitioners and the proceedings resumed. Petitioner Meyes continued his interruptions and insisted Mr. Atkins was not "properly prepared." [Tr. of R. pp. 43-44.]

The matter of Mr. Atkins' preparation was again discussed. [Tr. of R. pp. 45-46.] At this time Douglas interrupted and informed the court that he had talked with an attorney *the prior day*, and the attorney had said he'd be back that day or the next day. (This, even though his attorney only a short time earlier had represented that said attorney would actually represent Douglas.) [Tr. of R. p. 46.] Meyes again charged that Mr. Atkins had only seen petitioners twice for "about ten or fifteen minutes." Mr. Atkins countered that the visits had been for "at least an hour or an hour and a half." [Tr. of R. p. 47.]

At this time, the proceedings commenced. Mr. Atkins successfully, and in a legally competent manner argued a motion to exclude witnesses during the trial, and his argument showed he was aware of testimony which would be "common" to all the witnesses. [Tr. of R. pp. 55-58.]

Mr. Atkins then proceeded to *voir dire* the jury in a most competent and prepared manner. [Tr. of R. pp. 59-70.]

After a period of *voir dire* and recess Mr. Atkins approached the bench and advised the trial judge that petitioners refused to go further with the trial and that "they still have not accepted me as their counsel and representing them in this trial." [Tr. of R. p. 72.]

Douglas advised the judge that "we stand on our right to dismiss counsel . . . ." Mr. Atkins advised Douglas that if they dismissed him they could be forced to proceed without counsel. [Tr. of R. pp. 72-73.] Meyes stated that this would be illegal. [Tr. of R. p. 73.]

At this stage of the proceeding, a running colloquy between Mr. Atkins, the deputy public defender, Meyes, Douglas, and the trial court commenced. The essence of this colloquy concerned the dismissal of Mr. Atkins as their counsel by both Meyes and Douglas. [Tr. of R. pp. 73-83.]

A recess was taken, and after said recess, Mr. Atkins advised the court he had "discussed the matter thoroughly" with both Meyes and Douglas. [Tr. of R. p. 74.] The court asked *Douglas* if he wished to dismiss counsel and *Meyes* answered that *he* did because Mr. Atkins was not properly prepared. The court advised Meyes that he was talking to Douglas, and Douglas stated, "It is my desire because he is not properly prepared to defend me and Mr. Meyes at the same time . . ." [Tr. of R. p. 74.]

The trial judge advised Douglas that he'd have to put on his own case and Douglas stated that he would have "nothing to say" after the prosecutor put on his case. [Tr. of R. pp. 74-75.]

Douglas stated he fully understood that he'd have the obligation of his defense if Mr. Atkins were dismissed, but he still wanted to dismiss him. [Tr. of R. p. 75.]

Meyes stated he wanted to dismiss Mr. Atkins also because Mr. Atkins "is not qualified," or "properly prepared to defend us . . ." Meyes said he desired "an attorney", but not Mr. Atkins. The judge advised Meyes he could not make a conditional dismissal of Mr. Atkins to secure another attorney. [Tr. of R. p. 75.]

At this time, Mr. Atkins advised the court, *"Now, I have prepared this case so that I could defend it now."*

The only deficiency in his preparation, according to Mr. Atkins was failure to "cross index" the former trials of Meyes and Douglas, but that "I feel I would be able to do that as I go along, and it may not be to Mr. Meyes' satisfaction or Mr. Douglas' satisfaction, *but I would be able to do that and do it properly.*" [Emphasis added; Tr. of R. pp. 75-76.]

Mr. Atkins continued:

> ". . . . I have emplored them, even though they do not want me, to let me continue the case because my conscience does not allow me to let these two boys go through a trial of this nature without an attorney." [Tr. of R. p. 76.]

Mr. Atkins advised the court that nonetheless the petitioners wanted to dismiss him. The trial judge observed that Douglas had dismissed Mr. Atkins without qualification but Meyes had not. Douglas then stated he didn't want Mr. Atkins but wanted to obtain other counsel. He stated ". . . I don't think Mr. Atkinson [Atkins] is prepared to defend me, and for that reason I would want to dismiss Mr. Atkinson." [Tr. of R. p. 76.]

The trial judge told Douglas he had to dismiss Atkins and proceed alone, or keep Atkins. Meyes then stated that Atkins was dismissed and that the "Court can go ahead and take advantage of us just like he has been." The trial judge ruled that without an unqualified dismissal of Mr. Atkins, they would proceed. [Tr. of R. pp. 76-77.]

Meyes and Douglas then stated they wanted to dismiss Mr. Atkins. Meyes stated, "Mr. Atkinson can't defend us . . ." Mr. Atkins stated that this was "not true." [Tr. of R. p. 77.]

A continued interchange between Meyes, Douglas and the trial judge included Meyes' comment ". . . We want legal representation against this cruel Mr. Carr, but we don't want Mr. Atkinson at all." [Tr. of R. p. 78.]

Mr. Atkins asked the trial judge how he could defend petitioners with their attitude and lack of cooperation. At this time Mr. Atkins asked Meyes:

> "Mr. Atkins: Well, now, suppose that this case were continued until Monday and I had that much time to prepare, would you still desire to have me relieved as your counsel?
>
> Defendant Meyes: Yes.
>
> Mr. Atkins: Mr. Douglas?
>
> Defendant Douglas: Well, if we could get private counsel for each of us, which would be proper, and get a week, I would go for it.
>
> Mr. Atkins: Go for what?
>
> Defendant Douglas: For to keep you as counsel. We can get a delay of a week and a counsel for myself.
>
> Defendant Meyes: You are speaking for me now. Don't speak for me.
>
> Defendant Douglas: Well, I said for myself, counsel for myself." [Tr. of R. pp. 78-79.]

The prosecutor stated that it appeared "this is a plan conceived by the defendants for the purpose of delaying tactics insofar as this case is concerned." He went on to observe:

> "Mr. Carr: Just a moment, please. They are not satisfied with this lawyer, not satisfied with anything. They are merely satisfied with making a lot of accusations, if your Honor please, against counsel that represents them.

> I understand that Mr. Atkins for a number of years was in the United States Attorney's office. He is well thought of in the public defender's office as one of their able defenders. It would not make any difference to these defendants, in my humble opinion, whether it was Grant Cooper or Jerry Giesler or a number of other leading lawyers here in Southern California and those around the San Francisco Bay area. If all of them represented them, they would still indulge in those delaying tactics." [Tr. of R. p. 79.]

Douglas stated that Mr. Atkins had not "had enough time to properly give me a proper defense" and that he "couldn't use him". Moyes stated, "I can't use him under any circumstances." [Tr. of R. p. 80.]

Both petitioners agreed that they did not want Atkins "under any circumstances." [Tr. of R. p. 80.]

The prosecutor suggested Mr. Atkins be retained to advise the petitioners in an advisory situation. Mr. Atkins stated:

> "Your Honor: I oppose that motion, and I do so for this reason. If these defendants want an attorney to represent them, *I am here qualified and ready to try their case for them.* I do not want to be placed in the position of sitting in a trial that I cannot determine what will happen and cannot guide the trial toward the end that I believe it should be guided toward. . . ." [Emphasis added; Tr. of R. p. 81.]

The trial judge declined to retain Mr. Atkins in an advisory capacity and at petitioners' request he was dismissed, and the trial commenced. [Tr. of R. p. 82.]

ARGUMENT.

I.

Refusal to Appoint a Separate Counsel for Petitioner Douglas Was Not a Denial of Due Process of Law.

At the outset, it should be noted that respondent has set out a lengthy statement of the occurrences surrounding the request for separate counsel by Douglas and the ultimate dismissal of Mr. Atkins by both petitioners. (Pet. Br. pp. 6-9.)

It is submitted that the same matter as set out by petitioners fail, in their brevity, to disclose the total judicial picture confronting the trial judge when he was faced with the various demands of said petitioners.

For instance, counsel for petitioners sets out that Douglas had mentioned the name of a counsel, Leo Brennan, to his then appointed counsel, Mr. Atkins, who in turn told the court that Douglas had made arrangements for this Brennan to represent him. (Pet. Br. p. 9.) Counsel fails to mention that the *first* mention of Brennan was after a recess the morning of trial [Tr. of R. p. 36], and further that, Douglas later let it be known that he was in the first stages of negotiating with Brennan instead of having an actual arrangement with Brennan for representation. [Tr. of R. p. 46.]

It is submitted that a careful consideration of all that transpired on the morning of September 30, 1959 [Tr. of R. pp. 28-83] as set out above, allows one to conclude that in many ways, petitioners themselves were the sole architects of the trial structure which found them standing mute and without counsel during the damning testimony that followed their dismissal of counsel, while

a consideration of the brief by petitioners' counsel alone leaves one with the impression that a legal steam engine ran over two meek and ignorant indigents.

It is conceded that the subject of a possible conflict of interests between Meyes and Douglas came up at the time of trial. However, while said conflict was called to the attention of the trial judge, it was done so, only after petitioners sought to peremptorily challenge the judge, failed in that; next moved for a continuance on the grounds of an incomplete investigation by the defense of possible alibi witnesses, and had that motion denied. [Tr. of R. pp. 28-29.]

The shocked and indignant feeling of petitioners' counsel herein (Pet. Br. pp. 7-8) was apparently not felt by the trial counsel appointed to represent Meyes and Douglas. It would seem only logical that if the conflict of interests between these two petitioners were of great substance that it would have been brought forth immediately upon the convening of court, rather than as step three in the apparent plan to stall the day's proceedings which had been scheduled for that date (September 30, 1959) since August 18, 1959.

There is no argument that the public defender was not properly appointed to represent both petitioners initially on August 18, 1959, under California law. [Tr. of R. p. 9.]

In re Hough, 24 Cal. 2d 522, 528;

Cal. Gov. Code, §27706(a).

There is also no doubt in California that the Office of the Public Defender is staffed with outstanding legal talent:

"This court can take judicial notice, too, that it would be difficult to find in California any lawyers more experienced or better qualified in defending criminal cases than the public defender of Los Angeles County and his staff."

People v. Adamson, 34 Cal. 2d 320, 333, 210 P. 2d 13, 19.

See:

Stroble v. California, 343 U. S. 181, 196, 72 S. Ct. 599, 607, 96 L. Ed. 872.

It is submitted that the instant record fully supports the conclusion that Mr. Atkins was a highly articulate and competent attorney. [Tr. of R. pp. 28-83.]

The false charges against Mr. Atkins by both petitioners with respect to preparation for trial and amount of contact with petitioners by Mr. Atkins, and the various contradictory statements by petitioners undoubtedly led the District Court of Appeal to dismiss the separate counsel contention by stating:

". . . As the People suggest, the record clearly shows defendants were attempting improperly to delay the proceedings by a last-minute dismissal of the public defender." [Tr. of R. p. 186.]

Meyes constantly referred to Mr. Atkins' lack of preparation even though Mr. Atkins had stated, "On my own part I feel that I am prepared." [Tr. of R. p. 32] and "I have prepared this case so that I could defend it now" [Tr. of R. p. 75] and "I am here qualified and ready to try their case for them." [Tr. of R. p. 81.]

Meyes and Douglas ultimately stated that under no circumstances did they want Mr. Atkins to represent

them. [Tr. of R. p. 80.] They stated, in essence, that they didn't want Mr. Atkins even if he was prepared. [Tr. of R. pp. 78-79.]

Respondent does not mean to imply that if there is a valid legal ground for appointment of separate counsel for two different defendants, such legal ground is neutralized because the two defendants happen to be insolent, as in this case. And yet, the trial judge must make a ruling on a motion for separate counsel based on the facts presented to him, and where, as here, said motion is presented in such an aura of bad faith and contradictions by two indigent, but not legally ignorant defendants through their court-appointed counsel to whom they have given only insults in place of co-operation, and without any real showing of what their conflict of interests was, a negative ruling is understandable.

Counsel for petitioners contends that the ruling by the trial judge in the instant case conflicts with the federal rule enunciated in *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457; 86 L. Ed. 680 and the California cases of *People v. Kerfoot*, 184 Cal. App. 2d 622, 7 Cal. Rptr. 674; *People v. Robinson*, 42 Cal. 2d 741, 269 P. 2d 6; and *People v. Lanigan*, 22 Cal. 2d 569, 140 P. 2d 24.

However, in the *Glasser* case, *supra* (62 S. Ct. 457), it is submitted that defendant Glasser had retained an attorney, one Stewart, for himself. Against Glasser's wishes, the federal trial judge appointed Stewart to also represent codefendant Kretske. This Honorable Court set out at pages 465-467, several examples of how Stewart was hampered in his dual counsel role. These examples turned mainly on the fact that Kretske's role

in the alleged crime was different and apart from the role of Glasser and Stewart showed that he was reluctant to cross-examine some prosecution witnesses at the expense of one or another of his two clients.

However, in the instant case, the indigent petitioners had the deputy public defender appointed to represent both of them at the outset of the case without any objection until approximately a month and one half after the appointment when the trial was to commence. Further, in the instant case, the evidence discloses that both petitioners were joint and equal participants in the crimes charged as shown by testimony of witnesses who had been victimized by the petitioners. Their testimony was brief, cogent and contained telling and damning identifications of the two petitioners as participants in the crimes charged. [Tr. of R. pp. 104-151.]

One lower federal court has since interpreted *Glasser v. United States, supra* (62 S. Ct. 457), as requiring a showing that "the representation of codefendants by the same counsel resulted in . . . embarrassment to the attorney and prejudice to his clients." *Farris v. Hunter* (Circuit Ct. of Appeals, Tenth Circ.), 144 F. 2d 63, 65.

It has also been emphasized that in *Glasser v. United States, supra*, that this Honorable Court ". . . surveyed the entire record and found there *persuasive evidence* that the appointment of Stewart as counsel for the alleged co-conspirator had in fact embarrassed and inhibited Stewart's conduct of Glasser's defense. It pointed to *numerous and critical* instances in which Stewart found himself unable faithfully to serve two

masters. We see no resemblance between the situation found to obtain in that case and that developed here." (Emphasis added.)

Stowe v. McDonald (U. S. Ct. of Apps., Ninth Circuit), 173 F. 2d 852, 856, certiorari denied 337 U. S. 960, 69 S. Ct. 1522, 93 L. Ed. 1759.

It would appear that petitioners, under the federal rules alone, should be required to take the instant record and demonstrate wherein Mr. Atkins would have been at any substantial disadvantage in conducting their case during the actual trial on the merits. Respondent will discuss absence of any conflict in detail, *infra*, after a consideration of California cases cited by counsel for petitioners.

See also:

Sanders v. United States, 183 F. 2d 748, certiorari denied 340 U. S. 921, 71 S. Ct. 352, 95 L. Ed. 665.

In *People v. Lanigan, supra* (22 Cal. 2d 569), two defendants were charged with robbery. They had separate counsel, and after a first trial, Lanigan's counsel withdrew. Lanigan asked for a continuance until he could secure separate counsel. The trial judge, however, appointed the counsel for Lanigan's co-defendant to represent Lanigan over the objections of said counsel and Lanigan. It was at this time that Lanigan was first aware he would be without counsel unless he was allowed another counsel and time to confer with him. (In the instant case, it is to be recalled that petitioners

had had the public defender appointed to represent both of them at a date approximately a month and one half prior to trial, and then for the first time at trial, after two unsuccessful dilatory motions, they brought up the conflict of interests issue.

In *People v. Robinson, supra* (42 Cal. 2d 741), the California Supreme Court announced at pages 747-748, that it was "not necessary for Robinson to show that he had some diversity of interest from Pratt (*e.g.*, that he might have wished to attempt to strengthen his own case by casting blame for the crimes upon Pratt); entirely apart from any factually apparent diversity of interests. Robinson was *entitled to the undivided loyalty and untrammeled assistance of his own counsel.* . . ." (Emphasis added.)

At this point, it is undoubtedly wondered why a court which voices the above sentiments, would refuse a hearing in the instant case. [Tr. of R. p. 194.] However, factually, the California Supreme Court had found at page 748 of the *Robinson* case, *supra*, that:

> ". . . Robinson, at the time Mr. Coviello advised him two weeks or 10 days before the date set for trial that 'it would be wise for him to get another attorney so there would be no question of diversity of interests here,' was confined in the county jail and his opportunities to communicate with other attorneys were limited. According to his statement he 'was required, under the rules of the county jail, to seek new counsel by mail . . . It is a slow process . . .' He did make some attempts to obtain other counsel; it does not appear that he knew of the availability of the public defender or that he personally had opportunity to bring the matter

> to the attention of the trial judge until the case was called for trial. In the circumstances it does not appear that any dilatoriness chargeable to him was of sufficient substance to warrant the grave consequence of being required to go to trial without further opportunity to secure counsel of his choice."

But in the instant case, both petitioners had appeared on the same date, in the same court and had the public defender appointed to represent both of them. [Tr. of R. p. 9.] And then, three days later, both petitioners were back in court, represented by said public defender, and nothing was raised concerning a separate counsel. And it should also be noted that Meyes had been represented in his earlier murder trial by the Public Defender's Office although Douglas had private counsel. (Br. of Pet. p. 6.) No mention of separate counsel for Douglas was made until the opening day of trial after two other preliminary motions failed. These factors undoubtedly, motivated the California Supreme Court in their refusal to apply the principles of the *Robinson* and *Lanigan* cases, *supra*, to the instant case.

Counsel for petitioners relies almost exclusively in his argument on the instant point, on the case of *People v. Kerfoot*, *supra* (184 Cal. App. 2d 622). In this case, the California Supreme Court had refused to grant a hearing to review the Second District Court of Appeal's (Division One) decision on November 9, 1960. (The California Supreme Court refused to hear the instant case on February 21, 1961 [Tr. of R. p. 194], showing that said court was well aware of the decision in *People v. Kerfoot*, *supra*.)

In the *Kerfoot* case, *supra* (184 Cal. App. 2d 622), both defendants (in a murder case where the prosecu-

tion was seeking the death penalty) had undergone a first trial with separate and appointed private practicing counsel. Separate counsel had been appointed because a conflict of interests had been alleged. The jury failed to agree on a verdict. The matter was reset for a second trial and at a special hearing both counsel moved to be relieved as counsel due to the length of the first trial, and said motion was granted. Ultimately the public defender was appointed to represent both defendants in a second trial after the trial judge had found that there was "no conflict of interest between the defendants and that one attorney could represent both defendants." At page 627 of the *Kerfoot* decision, *supra* (184 Cal. App. 2d 622), it appears that at a motion for continuance heard fourteen days before the scheduled retrial date, the deputy public defender assigned to the case advised the court he had (1) *not received* copies of the former trial transcript and (2), that out-of-state-witnesses were needed. The deputy public defender then announced that the two defendants wanted to discharge him which said defendants proceeded to do with the trial court's approval.

Fourteen days later the cause was called for trial and it was found that one defendant had never received the transcript of the prior trial. The deputy public defender, who was in court that morning on another matter, offered to represent either one or both of the defendants if he could have more time to prepare. The attorney told the court of a possible conflict of interests and the difficulty that could arise at a later penalty hearing to determine whether both the defendants would suffer life imprisonment or the death penalty.

should they first be found guilty of first degree murder.

The judge indicated he might later appoint separate counsel if both defendants were found guilty of first degree murder. Both defendants refused the public defender in spite of the trial court's urging them to accept him. The judge found there would be no conflict and the trial proceeded. A jury found both defendants guilty of first degree murder. A penalty hearing before the same jury resulted in a sentence of life imprisonment as to both defendants.

It should first be noted that at page 635 (184 Cal. App. 2d 622), the reviewing court found that the trial court erred in discharging codefendant Demes' first trial counsel without proper notice, concluding that the defendant would not have consented to the withdrawal of his earlier counsel if he knew the trial judge would proceed later as he did. The court found that the consequences of dismissing his counsel had not been fully explained to Demes. As to the conflict in interests and necessity to appoint separate counsel for Kerfoot and Demes, the court found at page 637 (184 Cal. App. 2d 622):

> ". . . . *As between the defendants the evidence was as varying as it could possibly be*—Kerfoot was positively identified by at least two eyewitnesses as being the killer of Browse. No one testified that he saw appellant Demes at the scene of the robbery and the murder. Kerfoot was seen with a gun—the appellant was not seen with a gun. In the Las Vegas robbery one defendant (Kerfoot) apparently acted as the leader and the other, the appellant (Demes), apparently dis-

couraged such a course of conduct. The judge, however, made it plain that he would consider nothing other than the testimony which was introduced in the first trial. He refused to weigh the innumerable intangible factors which exist in practically every case such as this." (Emphasis added.)

The court further observed at page 643 (184 Cal. App. 2d 622) in quoting a cited case

"'. . . The more serious the offense of which he is accused, the more carefully will the safeguards of the law be thrown around him. It will not do in any case to say that the accused is plainly guilty of an atrocious murder and so the means used to convict is justified by the end to be attained.'"

The court also observed at pages 644-645:

"It is true that if no adverse interest *exists and none is claimed,* the representation of more than one defendant by a single attorney is permissible. (Sanders v. United States, 183 F. 2d 748; Setser v. Welch 159 F. 2d 703; Farris v. Hunter, 144 F. 2d 63; United States v. Roilnick, 91 F. 2d 911; Collinsworth v. Mayo, 85 F. Supp. 207.)"

At pages 645-646, the court commented with concern about the fact that the trial judge was prepared to give a continuance to defendants if they would accept the public defender, to enable him to go over the prior trial transcripts recently received, and yet denied a continuance to enable appellants to read the transcripts.

It is respectfully submitted that in the instant case, as pointed out repeatedly, *supra,* the petitioners did

not have their lawyer dismissed on little or no notice, they dismissed him approximately a month and one half after having had him appointed.

Further, there is no conflict of interests between the petitioners in the instant case, such as the one set out at length in the *Kerfoot* case, *supra*. In the instant case, the evidence is made up of testimony of eyewitness victims of the two petitioners. Their testimony shows that the alleged crimes all fell into the same pattern and in the same geographical area. Except for names, dates, and locations, each of the witnesses' testimony in the instant case bears a marked similarity due to petitioners' *modus operandi*, and is highlighted by clear identifications of both petitioners as perpetrators of the crimes. [Tr. of R. pp. 104-151.]

Since the contention by petitioners that there was a conflict in their interests at the trial of the instant case is predicated largely on the fact that they had both been tried earlier for the killing of a police officer who was attempting to arrest them for the instant robberies (Br. for Pet. p. 6; *People v. Meyes*, 198 A. C. A. 512), it is helpful to review portions of that murder case opinion.

> "Testimony, likewise limited only to the issue of motive, was received concerning certain robberies. The first was a robbery of participants in a poker game on June 9, 1958. A witness identified Meyes as having participated therein and having been armed with a drawn pistol. Other witnesses testified to a robbery which occurred July 21, 1958. Three men participated in the robbery, and two were identified as being defendants Meyes and Douglas. Meyes was armed with a gun and

during the course of the robbery struck one of the men across the head with the gun. Other witnesses testified to the holdup of a 'crap game' on July 25, 1958. Witnesses testified that Meyes participated and was armed at that time. There was no definite identification of Douglas. In this robbery one of the victims was shot through the chest. A shoeshine stand operator testified to a robbery on August 16, 1958, by two armed men. He identified Meyes and Douglas. Another witness testified that Meyes and Douglas were two of the three men who held up a crap game on October 10, 1958.

"Defendant Meyes testified in his own behalf. . . . He denied being involved in any robberies after his parole from state prison in June of 1957. . . ." *People v. Meyes, supra* (198 A. C. A. 512, 518).

Since Douglas was acquitted on the murder charge, the decision fails to catalog his testimony with respect to the robberies but we can assume he denied committing them, and in fact this is attested to by comments of the prosecutor in the instant case. [Tr. of R. p. 35.]

It appears that the summary of the witnesses' testimony in the murder case, *supra*, with respect to the instant crimes (to show motive for the killing) follows, in essence, the testimony actually given in the instant case [Tr. of R. pp. 104-151], otherwise the People's witnesses would have been guilty of perjury. Although the petitioners dismissed their counsel in the instant case and stood mute, it follows that their own testimony would have to be tied down to the same testi-

mony they gave at the murder trial with respect to the instant crimes, or petitioners likewise would be guilty of perjury.

No true conflict of interests between petitioners was even demonstrated to the trial court (and counsel for petitioners has certainly not spelled one out in his brief before this Honorable Court).

Lastly, the instant case is not a capital case.

These are undoubtedly the considerations that caused the California Supreme Court to distinguish the instant case from *People v. Kerfoot, supra* (184 Cal. App. 2d 622), and deny a hearing on February 21, 1961. [Tr. of R. p. 194.]

Returning our attention to the federal rule enunciated in *Glasser v. United States, supra* (315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680), we find that the rationale for requiring a separate appointment of counsel for Kretske instead of the procedure of appointing Glasser's counsel to represent both Kretske and Glasser, rests on the Sixth Amendment which gives an accused in a criminal proceeding in a federal court the right "to have the Assistance of Counsel for his defence". (62 S. Ct. 457, 464.)

> "The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate in a

given case, to deprive a litigant of due process of law in violation of the Fourteenth. . . ."

Betts v. Brady, 316 U. S. 455, 461-462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595.

What offenses triable in a state court require appointment of counsel as a matter of due process?

". . . [W]hen a crime subject to capital punishment is not involved, each case depends on its own facts. (Case cited.) Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, . . . the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel."

Uveges v. Pennsylvania, 335 U. S. 437, 440-441, 69 S. Ct. 184, 186, 93 L. Ed. 127.

The above principles enunciated by this Honorable Court, although dealing with the matter of right to counsel alone (as opposed to right to separate counsel), are nonetheless, peculiarly applicable to the instant case.

California provides for appointment of counsel for indigents in both capital and noncapital offenses.

Cal. Penal Code, §987.

Further, it is provided that where the "public defender has properly refused to represent the person

accused" another counsel may be assigned and receive reasonable compensation.

Cal. Penal Code, §987a.

In the instant case; we have seen that the public defender was, in fact, appointed to represent petitioners. [Tr. of R. p. 10.]

Therefore, the only right really involved in the instant case, is not petitioner Douglas' right to counsel, but his right to *separate* counsel, and analogizing to the right to counsel cases above, we see that Douglas' right is predicated on the question of whether or not denial of said right deprived Douglas of due process.

It is respectfully submitted that based on the propositions argued above and all of the facts of the instant case, the court did not deny petitioner Douglas due process of law as guaranteed by the Fourteenth Amendment of the U. S. Constitution, by refusing to appoint him a separate counsel.

Also, it is noted that counsel for petitioners has not alleged that Meyes was deprived of due process in any way at the trial, and for good reason. Even if this Honorable Court should feel that denial of separate counsel to Douglas was a deprivation of due process as to Douglas, such deprivation could not inure to Meyes' benefit. After all, Douglas discharged Mr. Atkins [Tr. of R. pp. 75, 81] thus leaving him free to operate as Meyes' attorney. In spite of Douglas' dismissal, Meyes made it clear he still didn't want Mr. Atkins. [Tr. of R. p. 79.] Representative of Meyes' attitude was his statement that he didn't want Mr. Atkins "under any circumstances." [Tr. of R. p. 80.] Even though Meyes had said he felt that Mr. Atkins

wasn't properly prepared the facts further show that when Mr. Atkins asked Meyes if he'd accept him as counsel with more preparation, Meyes said he wouldn't want Mr. Atkins as his counsel. [Tr. of R. p. 78.]

However, the record supports the trial judge's conclusion that Mr. Atkins was then prepared. [Tr. of R. pp. 32, 75, 81.]

It is a somewhat interesting commentary on the overall performance of petitioners in resisting the representation of the Public Defender's Office at the trial that after they were convicted on all counts charged, and the proverbial chips were placed before them in the form of sentences to be imposed, both petitioners requested representation of counsel at the sentence hearing. More particularly, both petitioners requested to be represented by the Public Defender! [Tr. of R. pp. 171, 175.]

It is again submitted that *both* petitioners were properly tried under all of the circumstances and without deprivation of due process. However, if the court feels Douglas was entitled to a separate appointment of counsel, then Meyes' conviction should be affirmed as were the convictions of Kretske and Roth in *Glasser v. United States, supra* (315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680).

II.

Petitioner Douglas Was Not Denied Due Process With Respect to His Failure to Obtain a Separate Copy of the Trial Record, and Both Petitioners Were Not Deprived of Due Process of Law When the California District Court of Appeal Refused to Appoint Them Counsel on Appeal After Said Court Made an Independent Investigation.

A. Transcript on Appeal.

Counsel for petitioners first contends that petitioner Douglas was denied his constitutional right to a record on appeal. (Br. of Pet. pp. 13-14.)

It is a fact that both Meyes and Douglas separately requested transcripts of the trial in the instant case. [Tr. of R. pp. 24-27.] The record shows that the trial record of the instant case was filed with the reviewing court on January 6, 1960. [Tr. of R. p. 182.] A "Petition (mandate) for order *re* transcript" was denied on March 25, 1960. [Tr. of R. p. 182.]

As part of the appellate proceedings, a document entitled "Appellant's Opening Brief on Appeal" was filed on May 17, 1960. In the lower right hand corner of said document appeared the names of both petitioners as follows:

P. O. A-55779
BENNIE WILL MEYES
&
WILLIAM DOUGLAS
P. O. A-55779
Represa, California
In Propria Persona
For Appellants"

The internal structure of said document supported the conclusion that said document was presented on behalf of both petitioners as an appeal from their convictions. After respondent herein filed a "Respondent's Brief" on September 8, 1960, Meyes filed a document on September 28, 1960 entitled "Appellant's Reply Brief". This document contained only Meyes' name and prison address. [Tr. of R. p. 182.] In the "Appellant's Reply Brief", the matter of the transcript being in Meyes' sole possession, is brought up for the first time and Meyes states that the "Appellant's Opening Brief" is to be treated as his alone, in spite of the fact that said opening brief purported to cover both petitioners in all respects.

After this attitude concerning separate appeals was communicated to the appeals court, Douglas was notified on October 20, 1960 that he had to file his opening brief or his appeal would be dismissed. [Tr. of R. p. 182.]

On November 9, 1960 a letter from Douglas was filed in which he refused to adopt the brief filed by Meyes. [Tr. of R. p. 182.]

It is conceded that when the trial transcript was filed in the District Court of Appeal on January 6, 1960, that Meyes was in San Quentin prison and Douglas was in Folsom prison located 119 miles from San Quentin. (Br. for Pet. p. 4.) It is further acknowledged that the District Court of Appeal later held that Douglas had adopted the briefs filed by Meyes in spite of Douglas' letter. [Tr. of R. pp. 182, 192.]

Counsel for petitioners relies on the case of *Griffin v. Illinois*, 351 U. S. 12, 100 L. Ed. 891, 76 S. Ct. as authority for the proposition that Douglas was denied

due process in not receiving a separate copy of the transcript apart from the copy received by Meyes and the one lodged with the District Court of Appeals. (Br. for Pet. pp. 13-14.)

California provides that a defendant appealing from a superior court judgment of conviction for a felony is entitled to the reporter's transcript of the evidence at the expense of the state.

> *People v. Smith*, 34 Cal. 2d 449, 211 P. 2d 561;
>
> *In re Paiva*, 31 Cal. 2d 503, 190 P. 2d 604;
>
> *Hidalgo v. Municipal Court*, 129 Cal. App. 2d 244, 277 P. 2d 36.

As stated above, the appellate court and Meyes received copies of the trial transcript on or about January 6, 1960. [Tr. of R. p. 182.] Four months later, Meyes filed a brief which purported to represent both petitioners' causes. Some ten months after the original filing of the trial record, Douglas, notified the court that he did not want Meyes' brief to cover his own cause. [Tr. of R. p. 182.] If Douglas wanted the transcript of the trial, it is submitted that these two petitioners were incarcerated within 119 miles of each other, and their demonstrated ability to communicate intelligently in the trial court is the antithesis to their apparent inability to communicate with each other over the exchange of the rather short trial transcript.

This Honorable Court stated at page 899 in *Griffin v. Illinois* (100 L. Ed. 891):

> ". . . We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. . . ."

In the instant case, as in all appellate cases, California does purchase a transcript for the defendant *supra*, as they did in the instant case, sending it to Meyes. Since defendant Douglas could easily have arranged for an exchange of the transcript in the several months that followed its filing, can it be said Douglas was denied due process?

Even more important, it would be an act without substance for this Honorable Court to hold that due process was not afforded Douglas due to the refusal of the state to supply him with a transcript in addition to the one Meyes had, for the following reasons:

1. Meyes filed an opening brief that covered all of the possible legal errors, except the matter of Douglas' possible right to separate counsel, which matter was raised on appeal by this respondent.

2. The state appellate court had a copy of the trial transcript before it when the matter came on for adjudication.

3. Apparently counsel for petitioners herein was satisfied that all the legal grounds for reversal available to Douglas were raised at the state level, because he has raised no new points before this Honorable Court concerning Douglas' trial.

4. This Honorable Court has the trial transcript before it now.

None of these propositions were true in *Griffin v. Illinois, supra*, where this court, due to lack of any record at all, had to "assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not

get appellate review of those errors solely because they were too poor to buy a stenographic transcript." (100 L. Ed. 891, 897.)

B. Counsel on Appeal.

Both petitioners requested counsel for purposes of their appeals, and their requests were denied. [Tr. of R. p. 182.] Counsel for petitioners contends that as a matter of due process, they were entitled to counsel on appeal. (Br. for Pet. pp. 14-21.)

As counsel for petitioners acknowledges at page 15 in his brief, California has judicially declared that:

> "It is our opinion that appellate courts, upon application of an indigent defendant who has been convicted of a crime, should either (1) appoint an attorney to represent him on appeal or (2) make an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed. This investigation should be made solely by the justices of the appellate courts. After such investigation, appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court." *People v. Hyde*, 51 Cal. 2d 152, 154, 331 P. 2d 42.

The California court that reviewed the instant case (Second District Court of Appeal, Division Three) has held:

> "Appointment of counsel to represent indigent appellants is not a matter of right as a part of

due process. It is discretionary with the court whether counsel should be appointed and a request for appointment should be denied if it clearly appears from the record that the appeal or other matter before the court is devoid of merit. (Other states and federal case cited as authority.) There is no statutory enactment which requires that counsel be appointed. Whenever the record discloses a question of error in the trial or other proceeding which counsel could in good conscience urge in behalf of the client an appointment has been made. Where counsel have not been appointed, the court has made an independent study of the record. We have done so in the present case." *People v. Logan*, 137 Cal. App. 2d 331, 332-333, 290 P. 2d 11.

As counsel for petitioners acknowleges, the District Courts of Appeal have consistently followed the procedure laid down by the California Supreme Court in *People v. Hyde, supra* (51 Cal. 2d 152, 154, 331 P. 2d 42). (Br. for Pet. p. 17.)

People v. Gillette, 171 Cal. App. 2d 497, 507, 341 P. 2d 398;

People v. Williams, 172 Cal. App. 2d 345, 348, 341 P. 2d 741;

People v. Lenaberry, 176 Cal. App. 2d 588, 589, 1 Cal. Rptr. 757.

In the instant case, with respect to petitioners' request for counsel, the Presiding Justice of the District Court of Appeal had issued a Memorandum on January 7, 1960, agreed to by a unanimous court, which was quoted by way of footnote in that court's Opinion. Said memorandum stated:

"I think the request should be denied. The defendants were convicted in a jury trial of 12 felonies, 10 of them being robbery of the first degree, one assault with attempt to commit murder and one assault with a deadly weapon. On the basis of the former convictions Meyes was found to be an habitual criminal. I have gone through the reporter's transcript. The witnesses for the People described each offense and identified the defendants as the perpetrators. The defendants did not testify.

"They were arraigned August 18, 1959. The Public Defender was appointed as counsel for each defendant. They pleaded not guilty August 21 and their trial was set for September 30. At the inception of the trial the defendants against the advice and even remonstrance of the court, refused to be represented by the Public Defender and asked for appointment of counsel of their own choice. The Deputy Public Defender sought a continuance to give him more time to prepare the case or have defendants find other counsel but the continuance was denied. The Deputy Public Defender tried in every way to assist the defendants but they 'heckled' him and threatened to continue to heckle him in his efforts to represent them. Finally they discharged him. In addressing the court the defendants were obstreperous and insolent. They refused to cross-examine witnesses or to produce any witnesses of their own. At no time was any representation made to the court by either defendant except by general statements that if they were represented by attorneys they could prove that the charges were a frame-up of the People's witnesses,

whom they described as a bunch of gamblers, and the police.

"The evidence of guilt was conclusive. The defendants would have had competent representation by the Deputy Public Defender. It is apparent to me that no good whatever could be served by appointment of counsel." [Tr. of R. pp. 192-193.]

It is submitted that the above quoted memorandum certainly supports the conclusion that the Court investigated the trial record fully and carefully.

It is conceded that Justice Traynor of the California Supreme Court feels that the principles laid down by his court in *People v. Hyde, supra* (51 Cal. 2d 152, 331 P. 2d 42), "should be expanded to require the appointment of counsel on appeal for all indigent defendants convicted of felonies."

People v. Brown, 55 Cal. 2d 64, 69, 9 Cal. Rptr. 836.

To Justice Traynor's observations in support of his opinion, *supra,* it is of interest to note what Justice Schauer observed in his separate concurring opinion at page 77 (55 Cal. 2d 64):

"From what has been quoted above from the opinions of the majority and of Justice Traynor it appears proper to infer that the granting of a hearing in the case at bench was influenced at least in part by the view of the specially concurring justice. If such inference is properly drawn it seems obviously appropriate to observe that although counsel appointed by this court performed his duties faithfully and ably, the appointment of an attorney for the defendant has not aided such defendant or furthered the proper administration

of justice. The only thing which the granting of a hearing accomplished has been a delay in final determination of this case and additional expense to the state."

To further elaborate on the thesis that the appellate practice in this state with respect to appointment of or refusal to appoint counsel, is in harmony with "the proper administration of justice" and due process, Justice Schauer has stated:

"I recognize that on appeal the defendant is no longer presumed to be innocent. To the contrary, his guilt has been established and every presumption is in favor of the regularity of the proceedings in the tiral court. I think, too, that those able justices of the District Court of Appeal who voluntarily undertake the added burden of independently researching the record for possible flaws in the judicial process as it has been applied to indigents, are to be commended for their devotion to the public interest. This devotion is so broad in scope that these justices give the skill and acumen of their seasoned experience to protecting the rights of the indigents, and at the same time to making unnecessary the expenditure of public funds which would ensue from the appointment of counsel, in cases wherein a paid attorney could accomplish nothing which would benefit the defendant, the state or the cause of justice. Those members of the Bar who (literally as amici curiae) likewise unselfishly aid the district courts in this work, are similarly to be commended.

"It bears emphasis that the duty assumed by the justices and the volunteer lawyers, is an exacting and onerous one. Under the majority de-

cision in People v. Hyde (1958), 51 Cal. 2d 152, 154 [1] [331 P. 2d 42], it is, as I understand the opinion, the unspelled out but implied duty of the reviewing court (in cases wherein an indigent requests and is refused counsel) to examine the entire record (augmenting it if appropriate) to the end of reaching and manifesting a fully informed and confident conclusion that there has been neither a denial of due process nor error which is prejudicial within the compass of People v. Watson (1956), 46 Cal. 2d 818, 835-836 [12] [299 P. 2d 243]. Only when the record shows such exacting care is it immediately apparent to subsequently petitioned reviewing courts that the quality of justice on appeal for the indigent is of the same standard as for the opulent." (Concurring and dissenting opinion.)

People v. Oliver, 55 Cal. 2d 761, 770, 12 Cal. Rptr. 865, 361 P. 2d 593.

Justice Schauer called attention to an appellate situation wherein the California Supreme Court's appointment of counsel after the District Court of Appeal had denied such appointment "hindered and delayed rather than furthered or expedited the just disposition of this cause." (Dissenting opinion.)

People v. Gullick, 55 Cal. 2d 540, 552, 11 Cal. Rptr. 566, 360 P. 2d 62.

It should be noted that the rule laid down in *People v. Hyde, supra* (51 Cal. 2d 152, 154), is still the rule followed in California.

This respondent could not presume to advance the grounds for upholding the policy of appointment of counsel practiced in California in a more cogent or elo-

quent manner than the Presiding Justice of the California court whose judgment is before this Honorable Court at this time:

"It has been advocated that counsel must be appointed whenever requested (see first concurring opinion People v. Brown, 55 Cal. 2d 64 [9 Cal. Rptr. 836, 357 P. 2d 1072].) The argument in favor of this procedure is not that representation is a matter of right, but that the courts (all District Courts of Appeal and all other reviewing courts) are not competent, without the aid of paid counsel, to examine a record on appeal and determine whether the appeal may possibly have merit or is unquestionably frivolous.

"Unlike the constitutional right of indigents to be represented by court-appointed counsel in the trial court, representation on appeal is regarded as discretionary with all reviewing courts, except in rare cases in which appointment of counsel is required by statute. The only requirement in our state is that if counsel is appointed a fee must be paid by the state, in an amount fixed by the court. (Pen. Code, § 1241.)

"Each court must have its own policy, and while these may differ, it is not to be presumed that any court would knowingly deprive an appellant of a substantial right in the matter of an appeal. The general practice has been to appoint counsel in all cases in which representation would serve a useful purpose and to deny counsel in cases of obviously futile appeals. It is our view that the matter should be treated as discretionary as long as the Legislature does not see fit to create the office of public defender for the reviewing courts.

"We must say, on behalf of the District Courts of Appeal, other than our own, that any low estimate of their ability does them an injustice. With rare exceptions the membership of those courts has been drawn from the ranks of lawyers in private practice, and trial judges. Over the years they have demonstrated to the satisfaction of the legal profession, and the public at large, an ability to perform the duties of the office.

"Division Three of the Second District was created in 1941. The six members of the court who have served from time to time formerly served upon the superior court. They had had a combined experience in the practice, both civil and criminal, including four years as deputy public defender, of 121 years, and as judges of trial courts a total experience of 87 years. They have served upon the court a total of 62 years. The court has received able assistance from members of the voluntary committees on criminal appeals of the Los Angeles County Bar Association and the Criminal Courts Bar Association in the examination of records for the discovery of grounds of appeal. It is a type of service that has been traditional with the profession from the earliest times, and the fact that it has been rendered gratuitously has not detracted from its value.

"In recent years there has been a great increase in the number of in propria persona appeals in criminal cases which, of course, is a matter of right. The cost of preparation of records on appeal has been great. Many of these appeals have been abandoned. Applications for appointment of counsel have been numerous. It is necessary for

the court to examine each record in order to properly act upon the request.

"If a record is voluminous counsel may be appointed, by this court, for that reason alone. In other cases counsel are appointed if a doubt exists that the appellant was afforded a fair trial. If appointment of counsel is denied the appellant is notified and given time to file a brief. Some briefs emanating from state prisons are authored by persons of considerable legal ability. But in no case in which appointment of counsel is denied is the appeal dismissed for failure to file a brief. The court, being already familiar with the record, disposes of the appeal on the merits by written opinion, in which the reason for denial of counsel is made clear. Rather than being deprived of a fair hearing, the appellant is given what is probably an excess of consideration.

"We cannot believe that all the courts have been wrong in exercising discretion, based upon an examination of the record, with respect to appointment of counsel on appeal. This court is not in favor of burdening the state with the expense of counsel fees in obviously hopeless cases."

People v. Vigil, 189 Cal. App. 2d 478, 480-482, 11 Cal. Rptr. 319.

Turning to the federal cases, it is seen that the Circuit Courts have repeatedly held that the right to an indigent to have counsel appointed for purposes of his federal court appeal is not a right guaranteed by the Constitution.

Moore v. Aderhold, 108 F. 2d 729, 732-733 (10th Cir. 1959);

Errington v. Hudspeth, 110 F. 2d 384, 386 (10th Cir. 1940); Certiorari denied, 310 U. S. 638, 60 S. Ct. 1087, 84 L. Ed. 1407;

Lovvorn v. Johnston, 118 F. 2d 704, 707 (9th Cir. 1941), Certiorari denied, 314 U. S. 607, 62 S. Ct. 92, 86 L. Ed. 488;

Brown v. Johnston, 126 F. 2d 727, 729 (9th Cir. 1942); Certiorari denied, 317 U. S. 627, 63 S. Ct. 39, 87 L. Ed. 507;

Gargano v. United States, 137 F. 2d 944, 945 (9th Cir. 1943);

Gilpin v. United States, 265 F. 2d 203, 204-205 (6th Cir. 1959).

Two cases should be noted, however, wherein this Honorable Court has held that where an indigent seeks to proceed *in forma pauperis* on appeal and the Federal trial court has certified the appeal is *not* taken in good faith (28 U. S. C. §1915, 28 U. S. C. A. §1915), said certification must be displaced upon "a proper showing" before a Court of Appeals and that the Court of Appeals must provide the indigent who challenges that certification "the aid of counsel unless he insists on being his own", but it should be noted that in one of the cases:

". . . This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial."

Johnson v. United States, 352 U. S. 565, 77 S. Ct. 550, 551, 1 L. Ed. 2d 593.

In the other case, it was held:

"Normally, allowance of an appeal should not be denied until an indigent has had adequate repre-

sentation by counsel. (Case cited.) . . . But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied."

Ellis v. United States, 356 U. S. 674, 78 S. Ct. 974, 975, 2 L. Ed. 2d 1060.

It is submitted that California procedure is certainly harmonious with the spirit of the *Johnson* and *Ellis* cases, *supra*. In contrast to the *Johnson* case, *supra*, California provides that a trial transcript will be before the court in *every* felony case where an appeal has been lodged: In contrast to the *Ellis* case, *supra*, the reviewing justices in California make a diligent investigation of said record *themselves* (as opposed to a counsel) and evaluate the case to determine whether it would serve the defendant or court any useful purpose to appoint counsel for further proceedings.

Counsel for petitioners relies almost exclusively on the case of *Griffin v. Illinois*, *supra* (351 U. S. 12, 100 L. Ed. 891, 76 S. Ct. 585), for the proposition that the California rule of *People v. Hyde*, *supra* (51 Cal. 2d 152, 331 P. 2d 42), falls short of compliance with Due Process of Law. (Br. for Pet. pp. 13-21.)

Counsel for petitioners states that under the rule in *Griffin v. Illinois*, *supra*, "an indigent convicted of crime is, as a matter of constitutional law, entitled to state aid in obtaining appellate review of trial errors

where review of such errors is available to persons able to pay attendant expenses." (Br. for Pet. p. 13.) Counsel for respondent heartily shares this view.

Counsel for petitioners goes on to cite Justice Traynor for the proposition that " 'Denial of counsel on appeal would seem to be a discrimination at least as invidious as that condemned in *Griffin v. People of the State of Illinois, supra*. . . .' " (Br. for Pet. p. 16.)

What counsel for petitioner (and Justice Traynor) fail to point out, is that this Honorable Court also held in *Griffin v. Illinois, supra* (100 L. Ed. 891 at p. 899):

> ". . . We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. *The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants*. . . . The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare." (Emphasis added.)

Accepting the propositions of counsel for petitioners concerning the extension of *Griffin v. Illinois, supra*, from the right of a defendant to a trial transcript on appeal to the right to a counsel on appeal, it is nonetheless submitted that California has already provided, *supra*, for an effective and satisfactory policy for appointing counsel to represent indigents on appeal (*People v. Hyde, supra*) and this policy was complied with in the instant case, *supra*.

Counsel's final argument in support of his contention that this California procedure does not afford due

process to petitioners is that an alleged error was found in this case that was "obvious" to the public defender and the respondent (conflict of interest at trial) but was not "obvious" to the trial judge, the three justices of the District Court of Appeal, and six of the seven justices of the California Supreme Court. (Br. for Pet. pp. 18-20.)

Apparently, counsel feels that it automatically follows that *only* an appointment of counsel on appeal could prevent such a thing from happening, and that the alternative of independent examination by the appellate court to determine whether counsel should or should not be appointed, must be here declared improper.

Counsel is also assuming that the trial judge and all the justices who considered the instant appeal, except one, missed the "obvious" point (conflict of interests, *supra*), an assumption respondent cannot accept logically. Counsel is also concluding that said "obvious" point is reversible error without allowing for the possibility that the appellate justices considered the point and chose to conclude it was not such an error for the same reasons set out in Argument I, *supra*.

However, accepting counsel's assumption for purposes of argument, it must follow that one trial judge and nine appellate justices would certainly not qualify for such an appointment to represent petitioners, because they failed to see the "obvious".

Respondent is sincerely not trying to be facetious, but is, instead, saying that as certain as the proverbial "death and taxes" is the proposition that you can always find one lawyer who will disagree with another on the validity of any legal point (including the existence of a meritorious point on appeal). To say other-

wise is to ignore a multitude of opinions of this Honorable Court, and lesser appellate courts across the land that fell short of being unanimous decisions.

It is safe to assert that counsel for petitioners would, if he were an indigent defendant, rather have his trial record reviewed for possible error by a group of experienced appellate justice who "are conscientious to a fault" (Br. for Pet. p. 20), than have said record assigned to a private practicing counsel who may treat his court appointment with irritation and undue haste, as many do.

Counsel for petitioners suggests that to allow the reviewing court the right to make an independent examination of the record to decide if defendant needs counsel, commits that court to a determination that there is no error, if said court decides no counsel should be appointed. (Br. for Pet. p. 20.)

Respondent offers no guarantee that such cannot happen just as counsel for petitioners can offer no guarantee that certain jurists do not have a blind spot when particular propositions of law arise, and, in a given case involving such a proposition of law, said jurist will decide a case in a manner prejudiced by said proposition. This is a weakness in the man, not the system.

It is forcefully felt, however, that there is nothing in the instant record to support counsel for petitioners' implication that the issues of the instant case were predetermined when the District Court of Appeal reviewed the record for purposes of deciding on whether or not to appoint counsel, or that they overlooked an "obvious" point of law.

Conclusion.

It is submitted that petitioner Douglas was not deprived of Due Process of Law by having the Public Defender represent he and petitioner Meyes at the trial level. Douglas further suffered no deprivation of due process in not receiving a separate copy of the trial transcript. Neither petitioner was entitled to appointment of counsel on appeal, as a matter of due process, where an independent review of the trial record was made by the District Court of Appeal, and said court decided not to appoint counsel.

Therefore, it is respectfully requested that petitioners' convictions be affirmed.

Respectfully submitted,

STANLEY MOSK,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

JACK E. GOERTZEN,
Deputy Attorney General,
Attorneys for Respondent.